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No. 96-1579

In the Supreme Court of the United States
OCTOBER TERM, 1997

JAMES BROGAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Should the "exculpatory no" doctrine, recognized by Courts of Appeals for seven circuits as a complete defense to a false statement charge under 18 U.S.C. § 1001, but rejected below by the Second Circuit, be embraced by this Court?

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This *amicus curiae* brief is submitted in support of Petitioner, James Brogan. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. [1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 9,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure that criminal statutes are construed and applied fairly and in accordance with due process.

The NACDL files this *amicus curiae* brief to urge the Court to find that a person may not be convicted of a false statement crime, 18 U.S.C. § 1001, for simply stating "no" in response to a question posed by a federal investigator, where a truthful answer to the question would incriminate the person. This "exculpatory no" doctrine was the law in the vast majority of federal courts of appeals without

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

contrary authority for nearly thirty-five years, and was recently ratified as a correct interpretation of the statute by Congress.

The NACDL supports the application of this "exculpatory no" limitation on § 1001 for policy reasons consistent with its mission. Such a limitation encourages witnesses to share truthful information with the government (at least on matters short of those which may incriminate), because the interview itself will not pose as great a threat of prosecution. It also curbs law-enforcement abuse and prosecutorial overreaching — topics in which the NACDL and its members share a particularly strong interest.

SUMMARY OF ARGUMENT

Petitioner James Brogan was a union official suspected by the government of receiving bribes. Federal agents arrived unannounced at his home to question him. After answering general questions about his position with the union, Mr. Brogan responded "no" to a direct question whether he had ever received any money or gifts from JRD Management Corporation. Mr. Brogan petitioned this Court to answer the question whether his exculpatory denial could be prosecuted as a false statement under 18 U.S.C. § 1001.

At the time of Mr. Brogan's conviction, Section 1001 punished "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations." Starting in 1962, eight federal courts of appeals had held that § 1001 does not apply to a person who falsely denies wrongdoing in response to an accusatory question posed by a federal agent, in an investigative encounter initiated by that agent. Not until 1994 — sixty years after the passage of the relevant statutory

language — did any court of appeals disagree with this unanimous interpretation.

The legislative history of § 1001 indicates that Congress did not intend to punish a person cornered in the course of an investigation who, surprised by a direct accusation, denies complicity in a crime. Congress' motivation in enacting the statute was to protect the government from falsehoods designed to elicit a benefit from the government or to pervert government functioning. A simple denial of complicity in crime does neither. It merely requires government agents to collect information elsewhere, without affirmatively leading those agents astray with false leads about the conduct at issue.

After eight courts of appeals had held that § 1001 does not apply to denials of questions designed to elicit criminal admissions, Congress reenacted § 1001 in relevant part. Congress was well aware of the courts' longstanding interpretation. Its reenactment of the relevant language in § 1001, without change, manifested its acquiescence in the limitations the judiciary had inferred from that broad language. Indeed, in the course of reenacting the relevant language, Congress expressly stated its intent to carry forward these well-recognized limitations.

In addition to historical indications of legislative intent, sound policy reasons support the conclusion that § 1001 does not proscribe false exculpatory denials. By the passage of § 1001, Congress sought to achieve broad public cooperation with the regulatory goals of government. The exculpatory no limitation promotes this objective by encouraging witnesses to provide truthful information to the government, at least up to the point where the witness's answers would actually incriminate. Eliminating the limitation would create a disincentive for witnesses to share

any pertinent knowledge with the government. Where a simple exculpatory denial could itself lead to criminal prosecution, a rational witness with any conceivable criminal exposure would have little incentive to cooperate with the government *at all*.

Eliminating the exculpatory no exception would also encourage overreaching by law-enforcement agents. Where a statute-of-limitations bar or lack of sufficient proof on a particular element made it impossible to *prove* a crime, agents would have it within their power to *manufacture* one — by simply asking an incriminating question, and then initiating a prosecution based on the answer. In such circumstances, the "false" denial would not mislead anyone or interfere with any legitimate law-enforcement objective. Under the government's interpretation of § 1001, the denial would nonetheless be a crime.

For thirty-five years, the exculpatory no exception has provided a necessary safe harbor from this sort of overreaching. The salutary effects of the rule should not be abandoned now.

ARGUMENT

Amicus curiae the NACDL advocates a clear and narrow limitation on the scope of false statements proscribed by § 1001: the NACDL's position is that § 1001 does not apply where a federal agent instigates questioning of a person who may know facts relevant to wrongdoing, where the agent poses a yes/no question to which the true answer would incriminate the person, and where the person gives the false exculpatory answer. The NACDL does not subscribe to the broader view that the statute precludes prosecution of those who (1) elaborate upon a simple exculpatory denial by affirmatively misdescribing facts, (2)

provide false denials to questions that would not implicate them in a crime, or (3) deny wrongdoing while volunteering information to obtain a government benefit. The exculpatory no doctrine's narrow limitation on the reach of § 1001 is supported by legislative intent as revealed in the drafting and revision of the language of the statute, by Congressional ratification of a longstanding judicial interpretation embracing this limitation, and by sound policy reasons.

I

THE FALSE-STATEMENT STATUTE WAS NEVER INTENDED TO PUNISH EXCULPATORY DENIALS

A simple exculpatory denial of the sort historically shielded by the exculpatory no exception has never been within the ambit of misconduct covered by the false-statement statute. As the evolution of the statute shows, Congress's concern has been limited to false statements that either (1) promote fraudulent claims, or (2) pervert agency functions. An exculpatory denial implicates neither of these concerns.

The Act of March 2, 1863 — "An Act to prevent and punish Frauds upon the Government of the United States" — was the progenitor to the present version of 18 U.S.C. § 1001. 12 Stat. 696. That Act focused on statements or conduct resulting in the approval of false claims against the federal government, and particularly false claims made by members of the armed forces. Specifically, it punished as criminal:

> any person . . . who shall make or cause to be made . . . any claim upon or against the Government of the United States, or any

> department or officer thereof, knowing such claim to be false, fictitious or fraudulent; [and] any person . . . who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false . . . statement . . . .

Id. at 696-697.

The statute was modified in minor respects in 1874, *see* Codification of December 1, 1873, approved June 22, 1874, R.S. § 5438, 18 Stat. 1054 (combining provisions and equalizing punishments applicable to soldiers and to civilians; omitting false oath and forgery clauses; and removing stealing and embezzlement clause to a separate provision); in 1908, *see* Act of May 30, 1908, ch. 235, § 5438, 35 Stat. 555-556 (changing range of applicable penalties); and again in 1909, *see* Act of March 4, 1909, ch. 321, § 35, 35 Stat. 1088, 1095 (punctuation and grammatical changes only). Throughout this period, false statements were only punished if connected to a claim made against the federal government.

In 1918, Congress expanded the breadth of the statute in two principal respects and increased the maximum penalties. *See* Act of October 23, 1918, ch. 194, § 35, 40 Stat. 1015-1016. First, the revised statute encompassed false claims made to "any corporation in which the United States of America is a stockholder." *Id.* Second, it reformulated the false statement clause to proscribe more generally false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States" in addition to those made for the purpose of obtaining the payment of a false claim. *Id.* The false statement clause then read:

> whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully . . . make or cause to be made any false or fraudulent statements or representations . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Id. at 1015-1016.

This Court construed the amended statute in *United States v. Cohn*, 270 U.S. 339 (1926), and limited the effect of Congress' choice of words. The Court sustained a demurrer to a criminal indictment charging that the defendant had made a false statement to obtain possession of imported items consigned to the United States Customs Department, when he was not entitled to those items until he paid the consignor for them. The Court held that the statute's proscription of false statements must relate solely to claims "for money or property to which a right is asserted against the government, based upon the Government's own liability to the claimant." *Id.* at 345-46. The Court further held that the "defrauding" clause must be limited to "cheating the Government out of property or money." The Court rejected the government's argument that it meant also "interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means." *Id.* at 346.

Against this backdrop, Congress again amended the false statement statute in 1934. Prompted by a letter from

Harold L. Ickes, Secretary of the Interior, congressional committees looked into problems faced by agencies in the submission of false papers by regulated parties in connection with fledgling New Deal programs. *See* S. Rep. No. 73-288, at 1-2 (1934); H. Rep. No. 73-829, at 1-2 (1934). The Interior Department confronted difficulty in enforcing laws entrusted to it, S. Rep. No. 73-288 at 1, prominent among which was the Hot Oil Act, which prohibited the interstate transportation of oil in excess of amounts authorized by the federal government. *See United States v. Gilliland*, 312 U.S. 86 (1941). The petroleum industry routinely submitted false affidavits as part of "reports" required by agency regulations, and the government had no recourse against those who made such false statements. *Id.* at 90.

Congress responded to this problem by again broadening the false statement statute, this time adopting language broad enough to fend off the type of judicial limitation imposed by the Court in *Cohn*. As amended, the false statement clause, still embedded in the same section with the false claims prohibition, applied to:

> whoever shall knowingly and willfully . . . make or cause to be made any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder.

Act of June 18, 1934, ch. 587, § 35, 48 Stat. 996.

This Court in *Gilliland* confirmed that the 1934 revision accomplished what Congress set out to do: It curbed the efforts of regulated parties to thwart the regulatory functions of federal agencies by providing false

information about the substance of their activities. In *Gilliland*, the Court reversed a demurrer to an indictment charging that the defendant had submitted false forms to the Department of the Interior regarding oil shipments. Rejecting the defendant's argument that the revised statute covered only false statements related to matters in which the government had a financial interest, the Court held that the "amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *Id.* at 93.

Until 1996 Congress made no further substantive revision of the false statement clause. In 1938, there were minor punctuation and organizational changes. *See* Act of April 4, 1938, Pub. L. No. 465, ch. 69, § 35, 52 Stat. 197. In 1948, Congress reorganized the criminal code, for the first time separating the false claims provision now contained in 18 U.S.C. § 287 from the false statement provision that is now § 1001. *See* Act of June 25, 1948, Pub. L. No. 772, ch. 645, §§ 287 & 1001, 62 Stat. 683, 698, 749. The only change made to the new § 1001 was that the phrase "within the jurisdiction of any department or agency of the United States" first appeared at the beginning of the provision rather than at the end.

After *Gilliland*, this Court construed § 1001 several times, in each instance confining its application to false statements that perverted an authorized function of the relevant government agency. In *United States v. Bramblett*, 348 U.S. 503 (1955), *overruled on other grounds*, *Hubbard v. United States*, 514 U.S. 695 (1995), it affirmed a jury verdict of guilty for a defendant who falsely represented to the Disbursing Office of the House of Representatives that a person was entitled to compensation as his official clerk. In *Bryson v. United States*, 396 U.S. 64 (1969), the Court

denied a petition for habeas corpus of a convicted person who had denied his affiliation with the Communist party in an affidavit submitted to the NLRB, so that his union could obtain hearing rights before the NLRB. In *United States v. Knox*, 396 U.S. 77 (1969), the Court reinstated an indictment based on the defendant's understatement of the number of people he employed in his wagering business on a form submitted to the Internal Revenue Service. In *United States v. Yermian*, 468 U.S. 63 (1984), the Court upheld a conviction based on falsities in a Department of Defense security questionnaire, submitted by the defendant's employer to obtain defense contracts. And, in *United States v. Rodgers*, 466 U.S. 475 (1984), the Court reinstated an indictment based on a false story told to the FBI by a defendant who instigated the encounter to prompt the FBI to use its resources to find his estranged wife for him. In each of these cases, the charges alleged that a person, with a false story, either attempted to extract a benefit or services from a government agency, or perverted the objective of a government agency from performing its regulatory, collection, or oversight functions.

Congress' revisions of the false statement statute do not indicate any intent to extend the conduct made criminal by § 1001 beyond statements that promote false claims or pervert agency functioning. Straightforward exculpatory denials of guilt in the narrow circumstances discussed do not pervert agency functioning in the sense that Congress sought to address when it broadened the reach of the statute in 1934. Government agents know that when they surprise a person with accusations of wrongdoing, the person's natural inclination, like that of the proverbial child caught with his hand in the cookie jar, is to deny involvement. In the real world of criminal investigations, such denials are necessarily taken with a grain of salt. *See, e.g., United States v. Medina De Perez*, 799 F.2d 540, 546 (9th Cir. 1986);

United States v. Phillipe, 173 F. Supp. 582, 584 (S.D.N.Y. 1959). Although a truthful confession by that person could materially aid the investigation, a false denial under these circumstances has no more potential to hamper the investigation than if the interviewee refused to answer the agent's question at all, which he unquestionably has a right to do.

Because simple exculpatory denials do not pervert agency functioning as do the false statements Congress sought to address in enacting and revising § 1001, this conduct ought not trigger criminal liability under the statute.

II

CONGRESS RATIFIED THE LONGSTANDING "EXCULPATORY NO" LIMITATION WHEN IT REENACTED § 1001 WITHOUT RELEVANT CHANGE

The original intent of Congress not to include exculpatory denials within the broad language of § 1001 is confirmed by the endorsement of this limitation by a subsequent Congress. Beginning in 1962, federal courts of appeals confronted the government's position that § 1001 applied to any instance where the defendant falsely denied criminal activity. For the next thirty-two years, every court of appeals presented with these facts recognized that § 1001 did not sweep exculpatory denials within its mantle. With knowledge of this widespread judicial interpretation of the statute, Congress reenacted the pertinent language in 1996, acquiescing in the limitation contained in the 1934 statute as explained by the courts.

A. The Courts of Appeals Have Interpreted § 1001 to Exclude Exculpatory Denials as a Basis for Criminal Liability.

In 1955, a federal district court held that the government could not use § 1001 to prosecute defendants who had answered "no" in response to questions by FBI agents on the matter whether the defendants knew of payments made to FHA officials. *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955). In 1962, the Fifth Circuit became the first federal court of appeals to recognize this limit on § 1001, excluding exculpatory false negative responses made to federal agents who instigate questioning. *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962).

Over the next thirty years, seven other circuits followed suit, some applying the limitation even more expansively than the Fifth Circuit originally articulated it. *United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972), *cert. denied*, 425 U.S. 935 (1976); *United States v. Chevoor*, 526 F.2d 178 (1st Cir. 1975); *United States v. Fitzgibbon*, 619 F.2d 874 (10th Cir. 1980); *United States v. Tabor*, 788 F.2d 714 (11th Cir. 1986); *United States v. Cogdell*, 844 F.2d 179 (4th Cir. 1988); *United States v. Taylor*, 907 F.2d 801 (8th Cir. 1990); *Moser v. United States*, 18 F.3d 469 (7th Cir. 1994).

During that period, four other circuits discussed the exculpatory no doctrine as it existed in other circuits, disagreed with the broad application that the doctrine had received in some courts, and reserved the question whether it would apply to a situation where an interviewee was approached for questioning in connection with a criminal investigation and merely denied complicity in response to a question that would inculpate him. *United States v. Capo*, 791 F.2d 1054 (2d Cir. 1986); *United States v. White*, 887

F.2d 267 (D.C. Cir. 1989); *United States v. Steele*, 933 F.2d 1313 (6th Cir.), *cert. denied*, 502 U.S. 909 (1991) (*en banc*); *United States v. Barr*, 963 F.2d 641 (3d Cir.), *cert. denied*, 506 U.S. 1033 (1992).

Thus, in the sixty years after the language of § 1001 was adopted in 1934, all twelve federal circuits with jurisdiction over criminal cases had either embraced an exculpatory no limitation on § 1001 or commented on it without rejecting it. No court of appeals disagreed until the Fifth Circuit in *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (*en banc*), reversed course, and the Second Circuit in this case, *United States v. Wiener*, 96 F.3d 35 (2d Cir. 1996), *cert. granted sub nom Brogan v. United States*, 117 S. Ct. 2430 (1997), followed suit.

B. Congress Was Expressly Aware of the Judicial Interpretation.

This Court will impute knowledge to Congress of the law as interpreted by the courts even in the absence of express indications of knowledge. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). But here, there is direct evidence that in maintaining the relevant language of § 1001 intact, Congress knew perfectly well of the courts' widespread acceptance of the exculpatory no limitation.

In 1981, the Senate evaluated a major overhaul of the criminal code. As part of an extensive report, the Committee on the Judiciary addressed several examples of restrictive applications placed on § 1001 by the courts. S. Rep. No. 97-307, at 402-415 (1981). The Committee discussed the narrow construction of the term "jurisdiction,"

id. at 403, the extension of the materiality element to every clause in the statute, *id.* at 404, and the exculpatory no doctrine as articulated in *Paternostro*. *Id.* In its proposal to the Senate, the Committee indicated its agreement that a narrow version of the exculpatory no doctrine accurately reflected the intent of the statute's framers, and suggested new language that would make the doctrine express:

> With respect to the so-called "exculpatory no" cases, the Committee has determined *to perpetuate* a limited version of this doctrine through the defense afforded in subsection (b). Under this provision it is a defense to a prosecution for an oral false statement to a law enforcement officer . . . that the statement was made "during the course of an investigation of an offense or a possible offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of such offense."

Id. at 407 (emphasis added; footnote omitted). Because the thorough code revision died in that session of Congress, Congress did not act on this proposal either way, and the statute remained unchanged at the expiration of the session.

C. Congress Ratified the Exculpatory No Limit on § 1001.

Congress revisited the scope of § 1001 after this Court decided *Hubbard v. United States*, 514 U.S. 695 (1995). That case reversed the Court's opinion in *Bramblett*, *supra*, which had held that § 1001 proscribed false statements made to the legislature and to the judiciary, as

well as those made to executive branch agencies. Concerned that Congress was no longer protected from persons who lied before it, congressional committees conducted hearings on the issue. *U.S. v. Hubbard: Prosecuting False Statements to Congress*: Hearing Before the Subcomm. on Crime on the House Comm. on the Judiciary, 104th Cong., Serial No. 41 (1995). As a result of those hearings, the House committee recommended Congress reenact § 1001, with changes designed to reverse, in part, the effects of the *Hubbard* decision. The portion of the proposal defining the criminal conduct remained the same as in the 1948 statute, [2] but the language "department or agency" — limited by *Hubbard* to the executive branch — was replaced with "the executive, legislative or judicial branch."

The Committee was careful to point out that it recommended these changes "while ensuring that the scope of section 1001 is limited, as it was prior to *Hubbard*." H.R. Rep. 104-680, at 2 (1996). Congress passed the amendment. The False Statements Accountability Act of 1996, Pub. L. No. 104-292, 110 Stat. 3459 (1996).

This Court has repeatedly held that when Congress reenacts a statute without change, with knowledge of a judicial or agency interpretation based on the language in the previous version, Congress ratifies that interpretation. *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n. 7 (1987) ("Congress has not amended the statute to reject our construction, nor have any such amendments ever been proposed, and we therefore may assume that our interpretation was correct."); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) ("[W]e have

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[2] The amendment did separate with subheadings the three different clauses of the statute, and made clear that the materiality requirement applied to each clause.

recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'") (citation omitted); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-382 (1982) ("[T]he fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983) ("In light of this well established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action."); *Evans v. United States*, 504 U.S. 255, 268-69 (1992); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) ("Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that the interpretation is the one intended by Congress.").

In one of the more celebrated cases of congressional acquiescence in a consistent judicial interpretation, the courts had crafted a statutory exemption that was in no way discernible from the language of the statute itself. *Flood v. Kuhn*, 407 U.S. 258 (1972). This Court had held in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), that the baseball industry was exempt from the proscriptions of the Sherman Act. In 1953, it reaffirmed that understanding of the Sherman Act, based on "Congressional awareness for three decades of the Court's ruling in *Federal Baseball*, coupled with congressional inaction." *Flood*, 407 U.S. at 273-74 (describing holding of *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953)). In 1971, the Court again evaluated Congress' failure to change the operative language of the Sherman Act, and held that such failure revealed that Congress had "no intention to subject baseball's reserve

system to the reach of the antitrust statutes." *Id.* at 283. Recognizing that there may be some "inconsistency and illogic" in the application of the baseball exception to the Sherman Act, the Court stated that "there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency." *Id.* at 284. It noted that any change in the longstanding interpretation of the statute must properly come from Congress, and not the courts. *Id.*

The doctrine of ratification is not limited to congressional silence in the face of Supreme Court authority. In *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974), this Court divined congressional intent based on congressional silence in the face of a statutory interpretation of "almost perfect consistency [in] the Courts of Appeals." The Court held that "in the face of this longstanding interpretation and the continued congressional silence," it would not deviate from this interpretation in its reading of the scope of the statute. *Id.* at 200-201. Likewise, in *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 780 (1985), the Court held that Congress ratified "[t]he *Scroggins* standard" as articulated in a series of lower court cases when it amended 5 U.S.C. § 8347.

This Court recently rejected an argument of legislative ratification in the context of a legislative history that differs in pertinent respects from the history of § 1001. In *United States v. Wells*, 117 S. Ct. 921, 931-32 (1997), the Court held that Congress had not ratified a judicial interpretation of 18 U.S.C. § 1014 holding materiality to be an element of the offense. Recognizing that "the significance of subsequent action or inaction necessarily varies with the circumstances," *id.* at 929, it held that Congress' reenactment did not ratify the judicial interpretation because the Supreme Court had "previously

described the elements of § 1014 without any mention of materiality" and "[i]t would thus be impossible to say" whether Congress adopted the view of the courts of appeals, or of the Supreme Court. *Id.* at 930. Here, of course, there was no conflict between the exculpatory no doctrine and the Supreme Court opinions construing § 1001. Moreover, when Congress reenacted § 1001, it was focused specifically on judicial limitations placed on the core criminal conduct proscribed by the statute. When Congress reenacted § 1014, as discussed in *Wells*, it addressed only penalty and definitional changes, and had no reason to consider and thus ratify judicial limitations placed on the elements of the statute.

Here, Congress was faced with over thirty years of near-unanimous authority limiting the scope of criminal liability under § 1001. Congress mobilized to change a different restriction this Court had placed on the text of the statute. But when Congress reenacted the statute to redress that particular limitation, it left intact the core provision defining criminal conduct on which courts had based the exculpatory no doctrine. This reenactment represents more than mere silence; it demonstrates Congress' acquiescence in the application of the exculpatory no limitation to the statute. Like the Court in *Flood*, this Court should maintain consistency and refrain from intruding on Congress' power to remove the exculpatory no limitation from the statute if it so desires.

III

SOUND POLICY REASONS SUPPORT THE EXISTENCE OF AN "EXCULPATORY NO" LIMITATION ON § 1001

A. An Exculpatory No Limitation Promotes The Sharing of Information With Government Officials.

False exculpatory denials are obviously not something that should be encouraged for their own sake. But if the larger goal of the statute is to promote accurate information sharing with the government, the exculpatory no rule serves this goal far better than the alternative. By providing a safe harbor for simple exculpatory denials, the exculpatory no rule avoids a powerful disincentive for witnesses to speak with investigators, and to provide truthful information short of that which may incriminate. Elimination of the rule might result in fewer false exculpatory denials — which, for reasons noted above, do not by their nature have a substantial capacity to mislead in any event. But that would come at the expense of a great deal of truthful and useful information that witnesses now have incentives to share with the government under the present rule.

A person whose name surfaces in the course of a criminal investigation, due to suspected involvement or proximity to a suspicious event, may wish to grant an interview to federal agents for any number of reasons. He may be unaware of any criminal wrongdoing and feel a sense of obligation to assist authorities; or he may be aware of wrongdoing and wish to cooperate to some extent with the hope of later receiving lenient treatment. Regardless of his motive, such a person often has knowledge of people and events that may assist the agent in contacting new leads for information and in reconstructing the events surrounding the

conduct in question. An investigating agent will benefit from whatever information he can collect.

If the person allows an agent to question him, he opens himself to the risk that the agent will confront him with inculpatory questions he would prefer not to answer. Although he is free not to answer, he may not understand this right, or if he does, he may nonetheless feel pressured to answer, or become concerned that silence will raise suspicions. But even if the person falsely denies wrongdoing, it is still in the best interest of the government for the interview to have occurred because it will have elicited other truthful information which will help to build the government's case. In a world where prosecutions under § 1001 cannot be brought against persons who merely deny guilt in the investigative setting, persons will not be deterred from granting such an interview, because they will face no risk of prospective criminal liability in doing so as long as any discursive information they supply is truthful.

On the other hand, in a world where the exculpatory no limitation did not apply, many people would be unwilling to speak with federal agents at all out of fear that their cooperation could be turned against them in a § 1001 proceeding. Understanding that an exculpatory no raised the possibility of a § 1001 prosecution, such a person would likely decline to grant an interview, to avoid the suspicion cast when he refuses to answer one question in an array. The diminished willingness of citizens to speak with government agents is far more likely to pervert the functioning of the investigating agency than is a narrow limitation on § 1001 that merely exempts false exculpatory denials of the sort that are unlikely to mislead in any event.

B. An Exculpatory No Exception Helps Curb Law Enforcement Overreaching.

Elimination of the exculpatory no rule would not only have perverse effects on the success of criminal investigations, but would also open the door to sharp law-enforcement practices. Courts have long been concerned that the prosecution of exculpatory denials may lead to abuse. In *United States v. Levin*, 133 F.Supp. 88, 90 (D. Col. 1953), the court reasoned that under a literal interpretation of § 1001:

> [a]ny person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime. . . . In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully falsified his statements, it would be a violation of this statute.

The court's concern with the anomalous situation of acquittal for the crime that the defendant has "falsely" denied and conviction for this "false" denial is not mere hyperbole. Not uncommonly, the criminal charge based on the conduct the defendant denied will drop out, leaving only a § 1001 charge. *See, e.g., United States v. Rodriguez-Rios*, 14 F.3d.

1040, 1042 (5th Cir. 1994) ("After a bench trial, the court dismissed the first count for insufficient evidence but found Rodriguez guilty on the second [count under §1001]."). Under the government's reading, Section 1001 would become a weapon to shore up an insufficient case or correct an earlier mistake.

United States v. Bush, 503 F.2d 813 (5th Cir. 1974), is illustrative of the ease with which § 1001 could be used for such purposes. In that case, IRS agents, claiming they wished to verify the tax forms of a third party, interviewed and then procured an affidavit from the defendant regarding a transaction between himself and the man under investigation. More than one year later — after the statute of limitations had expired for a § 1001 prosecution on the first affidavit — the agents returned to the defendant for his signature on another affidavit. Their obvious purpose was to *elicit* a § 1001 violation. The NACDL fears that all too often, that would be the practical day-to-day effect of a rule that criminalized exculpatory denials.

A similar situation arose in *United States v. Tabor*, 788 F.2d 714 (11th Cir. 1986). An IRS special agent investigating tax violations of another person came across information implicating Ms. Tabor in an illegal notary transaction under state law. After he familiarized himself with the details of Florida notary law, the IRS agent elicited false statements from Ms. Tabor regarding her notarization of a mortgage satisfaction. Although it was not misled in any way, the government no doubt *suspected* that the woman would falsely deny wrongdoing; and when it invited her to do so, she (regrettably) complied. This is not the sort of interaction between the United States and its citizens that should be encouraged. *See United States v. Cowden*, 677 F.2d 417, 420 (8th Cir. 1982) ("The Customs inspection should be conducted so that the probable result is compliance

with the law, not the eliciting of a violation of the law."). But it is precisely the sort of interaction that may become prevalent if the government's reading of § 1001 prevails.

These examples illustrate the potential abuses sanctioned by an interpretation of § 1001 that essentially allows agents to generate felony charges, based on falsehoods that pose no danger that the agents will be misled or that agency functions will be perverted. *See United States v. Stoffey*, 279 F.2d 924, 927 (7th Cir. 1960); *United States v. Dempsey*, 740 F. Supp. 1299, 1306 (N.D. Ill. 1990). For over three decades, the exculpatory no doctrine has provided an important check on the most obvious potential abuses. The rule has served as an important, salutary purpose, with the express sanction of Congress, and should not be jettisoned now.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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